

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 86-177)

CONSOLIDATION OF NEW ORLEANS, GRAMERCY, AND BATON ROUGE, LOUISIANA; CUSTOMS PORTS FOR MA- RINE PURPOSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document consolidates the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, for marine purposes only. This change will enable Customs to obtain more efficient use of its personnel, facilities, and resources. It will eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. Moreover, it will simplify vessel entry and clearance procedures and reduce expenses and paperwork for all parties involved thereby enabling Customs to provide better and more economical service to carriers, importers, and the public.

EFFECTIVE DATE: November 3, 1986.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Richard C. Coleman, Office of Inspection (202-566-8157). Legal Aspects: Donald H. Reusch, Carriers, Drawback and Bonds Division (202-566-5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Service field organization currently consists of seven geographical regions further divided into districts, with ports of entry within each district. Customs ports of entry are locations (seaports, airports, or land border ports) where Customs officers or employees are assigned to accept entries of merchandise, collect duties, clear passengers, vehicles, vessels, and aircraft, examine baggage, and enforce the Customs and related laws.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, by notice published in the Federal Register on April 10, 1986 (51 FR 12339), Customs proposed to consolidate, for marine purposes only, the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, located in the New Orleans, Louisiana, Customs district in the South Central Region.

Inasmuch as these three ports are located within approximately 60 miles of one another on the Mississippi River and perform similar services, it was estimated that the proposed consolidation would significantly reduce expenses without impairing Customs ability to provide services to area businesses or to the general public. The notice solicited public comment on the matter.

DISCUSSION OF COMMENTS

Few comments were received in response to the notice. One from the New Orleans Steamship Association expressed general support for the consolidation. They welcome the elimination of duplicate port functions, the simplification of vessel entry and clearance procedures, and the reduction of paperwork and expenses. However, they voiced concerns that it might cause problems if different shipping agents are involved in the entry and clearance of vessels visiting more than one of the consolidated ports.

Customs does not believe that the consolidation will cause any particular burden for the public or the various elements of the industry. Any accommodations necessary to adapt to the consolidation should not block the benefits to the public and industry resulting from fewer entries and clearances. Splitting the responsibilities for entry and clearance between different shipping agents should not be a major problem for the industry.

The New Orleans Steamship Association was also concerned that the proposed consolidation was similar to the New Orleans Vessel One-Stop System (NOVOSS), a trial program in the three port area that tested the practice of consolidating the ports. The Association was concerned that the NOVOSS program would not be fully evaluated if the consolidation took place too quickly.

The New Orleans district director has indicated that the NOVOSS program has been accepted by the local shipping industry and there was no reason to delay adopting the consolidation. Also, the district director noted that quick consolidation would be of benefit to the industry in regard to the payment of user fees for arriving vessels. (See T.D. 86-109, published in the Federal Register on June 11, 1986 (51 FR 21152), for an explanation of recently imposed user fees for obtaining Customs services.) Without legally binding regulatory amendments to consolidate the ports, a user fee would be required upon transacting Customs business at each port. After consolidation, one user fee can cover an entry even if it involves a vessel visiting more than one port in the consolidated port area.

After review of the comments and further analysis of the matter, Customs is adopting the proposal to consolidate the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, for marine purposes only.

Under this change, the laws and regulations administered and enforced by Customs relating to the entry of merchandise will continue to apply at the ports of New Orleans, Gramercy, and Baton Rouge, with each of these ports retaining its port code as well as its current geographical limits. However, the three ports will be considered to be one port for the purposes of the navigation laws. All of the requirements prescribed by the navigation laws administered and enforced by Customs, such as reporting the arrival and making formal entry of vessels arriving at the consolidated marine port from a foreign or another U.S. port (depending upon the vessel's nationality); and obtaining a permit to proceed between the consolidated port and other U.S. ports, will have to be complied with, as is now the case in existing consolidated ports.

It is anticipated that the consolidation also will result in reducing penalties incurred under the navigation laws if carriers fail to enter and properly clear merchandise being shipped in a residue cargo movement within the consolidated marine port (i.e., the ports of New Orleans, Gramercy, and Baton Rouge), and will reduce paperwork for carriers, importers, and Customs, because of the reduction of penalty cases.

There will be no change in the current geographical limits of each port. However, the list of Customs regions, districts, and ports of entry set forth in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended to reflect the consolidation of these ports for the purposes of the navigation laws.

EXECUTIVE ORDER 12291

Because this amendment relates to the organization of Customs, it is not a regulation or rule subject to E.O. 12291.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this amendment because it will not have a significant economic impact on a substantial number of small entities.

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although the amendments may have a limited effect upon some small entities in the affected areas, it is not expected to be significant because changes in the Customs field organization in other areas have not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it ex-

pected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624, Reorganization Plan 1 of 1965; 3 CFR 1965 Supp.

§ 101.3 [Amended]

2. To reflect this change, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended as follows:

In the South Central Region—New Orleans La., under the column headed "Name and headquarters", the following phrase is added under the listing "New Orleans, La."

"(The ports of New Orleans, Baton Rouge, and Gramercy, consolidated for purposes of the navigation laws. See T.D. 86-177.)"

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: September 9, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1986 (51 FR 35352)]

19 CFR Parts 24, 113

(T.D. 86-178)

CUSTOMS REGULATIONS AMENDMENT TO ESTABLISH INTEREST CHARGES ON CERTAIN DELINQUENT ACCOUNTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to establish interest charges for the late payment of supplemental duty bills (bills for additional duties ascertained upon liquidation or reliquidation), reimbursable services, and miscellaneous bills issued by Customs to organizations outside the U.S. Government, including sureties.

Presently, there is no provision in the Customs Regulations to charge interest for late payments of supplemental duties, reimbursable services, and miscellaneous bills. However, interest charges for late payments of supplemental duties is now mandated by law. Customs and the Treasury Department believe that charging interest on all delinquent accounts will provide an incentive for prompt payment and, if accounts are not paid timely, provide for reimbursement of interest costs resulting from Government borrowing.

EFFECTIVE DATES:

For amendments: October 31, 1986.

For interest charges:

(1) November 29, 1984: By statute, for liquidations or reliquidations on or after this date upon which increased or additional duties are due.

(2) November 1, 1986: For overdue bills for reimbursable services and miscellaneous amounts, for all actions initially billed on or after October 1, 1986.

(3) October 30, 1984: By statute, for all refunds of amounts paid as increased or additional duties which had been determined to be due upon liquidation or reliquidation.

(4) November 1, 1986: For refunds of amounts of interest that have been paid by parties-in-interest on overpayments of reimbursable services and miscellaneous amounts.

FOR FURTHER INFORMATION CONTACT: Accounting Aspects: Robert B. Hamilton Jr., National Finance Center, (317-298-1308); Bond Aspects: William Rosoff, Carriers, Drawback and Bonds Division, (202-566-5856); Legal Aspects: Arthur I. Rettinger, Office of the Chief Counsel, (202-566-2482); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a report from the Comptroller General to Congress dated August 21, 1978, the General Accounting Office recommended that Customs charge interest on all supplemental duty accounts 30 days past due as part of an effort for the U.S. Government to maximize its use of Customs collections to decrease Government borrowings. That report states that in four Customs Regions (Boston, Chicago, Los Angeles, and New York), accounts receivable for supplemental duties averaged \$8.5 million each month from April 1976 to March

1977 and that approximately 38 percent of that amount was over 90 days past due.

Present Customs collection policy is to (1) issue a bill which indicates that it is due and payable, (2) pursue collection in accordance with Federal claims collection standards, and (3) inasmuch as a surety is jointly liable, to make a demand on the surety and the principal for payment if the bill remains unpaid. Importers are required to post a bond to cover each Customs entry to guarantee the payment of increased or additional duties and satisfy other Customs requirements. Enactment of Pub. L. 98-573 required Customs to charge interest on delinquent supplemental duty bills, and interest is currently assessed in accordance with the Act.

Currently, there is no provision in the Customs Regulations for collection of an interest charge exceeding the principal amount, regardless of the time period of delinquency or additional administrative costs to the U.S. Government incurred as the result of special collection efforts. Further, it is necessary to amend the Customs Regulations to address enactment of Pub. L. 98-573, and provide for interest assessment on delinquent reimbursable services and miscellaneous bills. In Fiscal Year 1979, for instance, the percentage of the number of Customs supplemental duty and reimbursable service bills issued during that fiscal year and paid within 30 days was 57 percent. Another 30 percent of these bills were paid within 60 days, and only the remaining 13 percent of the bills were paid more than 60 days after the date of the bill. Customs and the Treasury Department believe that charging interest on delinquent accounts will provide an incentive for prompt payment and, if accounts are not paid timely, provide for reimbursement of interest costs resulting from unnecessary Government borrowing. Customs believes that a majority of those bills which are now paid within 31 and 60 days after the date of billing will be paid within 30 days with the added incentive of interest charges. This means that approximately 13 percent of the bills issued would result in action by Customs to charge interest.

NOTICE OF PROPOSED RULEMAKING

In this regard, on March 10, 1983, Customs published a notice in the Federal Register (48 FR 10077), proposing to amend Parts 24 and 113, Customs Regulations (19 CFR Parts 24, 113), to provide that interest charges would apply to late payments of supplemental duty bills (bills for additional duties ascertained upon liquidation or reliquidation), reimbursable services, (such as provided for in §§ 24.16 and 24.17, Customs Regulations (19 CFR 24.16, 24.17)), and miscellaneous bills (bills other than duties, taxes, reimbursable services, liquidated damages, fines, and penalties) issued by Customs to organizations outside the U.S. Government, including sureties.

The notice stated that if payment for an above-mentioned bill was not received by Customs within 25 days after the due date of the bill, interest charges would be assessed upon the delinquent principal amount of the bill, and calculated from the due date of the bill. The applicable interest rate was to appear on the bill. Interest on an overdue bill would have been assessed on the delinquent principal amount by 30-day periods. The full 30-day interest charge would have been assessed for each additional 30-day period or portion thereof that payment is delayed. The rate of interest was to be determined pursuant to the Debt Collection Act of 1982, Pub. L. 97-365. The applicable interest rate would have been available from any Customs regional financial management office after it is published.

The principal (i.e., the importer of record or party-in-interest) and the surety, would have been individually issued bills for interest and every 30 days thereafter, of the following elements: (i) the amount due, (ii) the accrual of interest charges if payment is not received within 25 days after the due date of the bill (iii) the applicable interest rate, and (iv) the joint and several liability of the principal and the surety.

Commenters had until May 9, 1983, to submit comments. Based upon the 20 comments received in response to the notice and Customs own initiative, changes have been made to the proposal. These changes also reflect T.D. 85-93, published in the Federal Register on May 29, 1985 (50 FR 21832), which implemented two provisions of the Trade and Tariff Act of 1984 (Pub. L. 98-573) relating to calculation of interest on overdue accounts and refunds. An analysis of the comments and discussion of the changes follow.

DISCUSSION OF MAJOR COMMENTS

Comment:

The proposal to collect interest charges on delinquent accounts is not authorized under current law and should be commenced only after specific authorization by Congress. A former Assistant Secretary of the Treasury (Enforcement and Operations) is quoted in the August 21, 1978, Report by the Comptroller General that Customs has not been granted legislative authority to charge interest and that it would not be in the best interests of the Government to assess interest because interest would also have to be paid on refunds from protests, reliquidations, and other actions. Therefore, it is concluded that legislation is required.

It is further stated that the fact that the Government has been awarded interest in court proceedings to collect duties cannot clothe administrative collection of interest with the force of law.

The proposal is one-sided and inequitable in that it provides no mechanism for the payment of interest to an importer on duty refunds. It is proposed that Customs pay interest on all accelerated drawback payments due when refund is not made timely.

Analysis:

After this comment was submitted, the President signed the Trade and Tariff Act of 1984 on October 30, 1984. By T.D. 85-93, published in the Federal Register on May 29, 1985 (50 FR 21832), Customs implemented two provisions of the Act to provide that interest on applicable overpayments or underpayments of increased or additional Customs duties shall be in accordance with the Internal Revenue Code rate established in 26 U.S.C. 6621 and 6622. This determination covers antidumping and countervailing duty payments as well as increased or additional duties determined to be due on a liquidation or reliquidation. In addition, it was determined that a uniform interest payment system should be established and that refunds pursuant to a court determination and payable under 28 U.S.C. 2644, and interest on overpayments and underpayments of estimated excise taxes determined at liquidation, shall be at the rate(s) prescribed under 26 U.S.C. 6621 and 6622.

Furthermore, § 623(b)(1), Tariff Act of 1930, as amended (19 U.S.C. 1623(b)(1)), clearly gives the Secretary of the Treasury statutory authority to prescribe the conditions of bonds. Section 623(d), Tariff Act of 1930, as amended (19 U.S.C. 1623(d)), provides that no condition in a Customs bond shall be held invalid on the ground that it is not specified in law.

Therefore, not only is this amendment equitable, it is also enacted pursuant to specific legislative authority.

Comment:

Relating to bills for supplemental duties, adoption of the final rule will encourage a flood of protests, in large measure not intended to challenge the basis for the liquidated duty increase, but merely to stay the collection of interest. Any attempt by Customs to collect interest after the "25th day following liquidation" would subsequently be cancelled and negated by the filing of a protest.

Analysis:

It appears the commenters misread the proposal. Customs did not propose to collect interest after the "25th day following liquidation," but 25 days after the "due date" of the bill. However, pursuant to Pub. L. 98-573 and T.D. 85-93, the due date of the bill for supplemental duties, as provided in § 24.3(e), Customs Regulations (19 CFR 24.2(e)), shall be 15 days from the date of liquidation or reliquidation and if not paid within 30 days after this date (the 45th day) shall be considered delinquent and bear interest from the due date (15th day after liquidation or reliquidation).

Comment:

The Debt Collection Act of 1982 provides that Customs is not covered by major portions of that law because, except as noted therein, the law does not apply to claims or indebtedness arising under the "tariff laws of the United States." Furthermore, it is suggested the

rate of interest on a bill be changed every 3 months while the bill is delinquent rather than remain the same.

Analysis:

The proposal advised that notwithstanding the above exclusion, because the Government also would be recovering similar costs in matters relating to Customs, consideration was being given to the use of the applicable percentage rate of interest based upon the current value of funds to the Treasury, in accordance with the Debt Collection Act.

However, Customs has reconsidered its position and determined not to use the rate of interest under the Debt Collection Act. Rather, it is appropriate that prejudgement interest be calculated at the same rate as provided for in 28 U.S.C. 2644 since it is that amount which Congress determined would compensate an importer for the loss of use of its money during a portion of the period in which the Government has the use of the money. In 28 U.S.C. 2644 it provides that interest shall be at an annual rate established under § 6621 of the Internal Revenue Code of 1954 (as modified by § 6622 (26 U.S.C. 6621 and 6622)). This is the rate which Customs will use. (See *United States v. Harold Goodman*, Slip Op. 83-92, Court No. 81-9-01150).

The notice proposed that the same percentage rate of interest applied to an overdue bill would remain in effect for that bill until complete payment is received. Customs has revised the proposal and determined that the percentage rate of interest will be adjusted based upon the semiannual determinations under § 6621 and be compounded daily in accordance with 26 U.S.C. 6622 for any period of time that such sums of the bill are outstanding.

Comment:

Section 580 of the Tariff Act of 1930 (19 U.S.C. 580), imposes "interest", not an "exaction". It is inequitable to impose a greater burden upon the surety than upon the principal. The rule should state whether the 6 percent amount assessed against a surety is in addition to, or is included within, the interest charged, if any, against the principal. Customs is without authority to adopt regulations which are inconsistent with the Congressional scheme limiting interest at a 6 percent rate on unpaid debts which are the subject of collection actions.

Analysis:

The Act of March 2, 1799, C. 22, § 65, 1 Stat. 676 (19 U.S.C. 580), is applicable to suits brought by the Government upon all bonds for the recovery of duties. The importer of record is liable for the principal amount of the debt (duty) and interest which is assessed upon the late payment of that principal amount. A surety bears the same liability. If Customs must sue the debtor under a bond, it is entitled to recover the principal amount of the debt, plus interest assessed

for the late payment, plus an additional amount of 6 percent assessed under 19 U.S.C. 580.

We believe 19 U.S.C. 580 is applicable only against delinquents where the Government must pursue collection through judicial action. Such action will be necessary under very limited circumstances. Most cases will not require use of the judicial process.

Comment:

Charging interest should be made by regulation with no change in the bond form (no bond rider), or bond forms should be amended upon renewal to incorporate the interest provision.

Analysis:

This comment has merit. The substance of the proposed bond rider on interest charges has been incorporated into the final rule relating to the bond structure which was published in the Federal Register as T.D. 84-213 on October 19, 1984 (49 FR 41152). Sections 113.62, 113.64 and 113.73, Customs Regulations (19 CFR 113.62, 113.64, 113.73), specify the agreement to pay charges demanded by Customs as a condition for basic importation and entry bonds, respectively. This document makes those same conforming changes to §§ 113.63 and 113.65, Customs Regulations (19 CFR 113.65). Customs has determined the word "charges" appearing in these sections to include interest charges for the late payment of supplemental duty bills (bills for additional duties ascertained upon liquidation or reliquidation), reimbursable services, and miscellaneous bills issued by Customs to organizations outside the U.S. Government, including sureties.

Comment:

Customs should obtain from bonding companies their proposed premiums for the new bond provision and publish this information in the Federal Register requesting comments.

Analysis:

This suggestion cannot be adopted because Customs lacks authority to do so.

Comment:

This proposal to charge interest on delinquent bills should be compatible with the Customs proposal relating to the new bond structure project published in the Federal Register on March 15, 1983 (see 48 CFR 11032).

Analysis:

This comment has merit. As noted, the substance of the proposed bond rider on interest charges has been incorporated into the final rule relating to the bond structure which was published in the Federal Register as T.D. 84-213 on October 19, 1984 (49 FR 41152).

Comment:

The principal on the bond is the primary obligor for the payment of monies due Customs and the surety is secondarily liable.

Analysis:

This is incorrect. Customs bonds make principals and sureties joint obligors. In this regard, see *U.S. v. Gissel*, 353, F. Supp. 768 (S.D. Tex. 1973) (T.D. 73-86); *aff'd* 493 F. 2d. 27 (5th Cir. 1974); cert. den. 955 Sup. Ct. 332, 419 U.S. 1012.

Comment:

The language of the rider to be attached to applicable bonds uses the term "late charge." The appropriate terminology should be "interest."

Analysis:

As noted, there is no bond rider. The new bonds provide for interest under the term "late charges."

Comment:

By T.D. 82-204 published in the Federal Register on November 1, 1982 (47 FR 49355), an annual fee was instituted for reimbursement of costs of Customs supervision of warehouses. If the annual fee is not paid timely, liquidated damages will be assessed. Will interest be charged on the last payment of the annual fee?

Analysis:

Provisions governing this fee are contained in §§ 19.2(a) and 19.5, Customs Regulations, rather than §§ 24.16 and 24.17, Customs Regulations, relating to reimbursable and overtime services. Although there is a billing system for the reimbursable services provided in §§ 24.16 and 24.17, there is no billing system for the annual warehouse fee. As no bills are issued to collect annual warehouse fees, no interest will be assessed at this time.

Comment:

Interest charges should be assessed upon the late payment of liquidated damages, fines, and penalties. There should be a provision for extending the due date on liquidated damages, fines, or penalties that may be under appeal or further review.

Analysis:

Customs does not agree. As stated in the proposal, miscellaneous bills do not include liquidated damages, fines, and penalties.

Comment:

Bills for reimbursable services and miscellaneous amounts are due and payable upon receipt in accordance with § 24.3(e), Customs Regulations. Under the proposed rule, interest would accrue on those bills which are not paid within 25 days after that due date. However, Customs would not know when a bill is due because, under existing procedures, only the debtor will know when the bill is received. It is suggested that Customs either provide a longer ini-

tial period before imposing interest (e.g., 45 days) or provide a clear opportunity for the importer to prove that receipt of the bill in question was delayed and that interest is not owed. It also is suggested that the due date be made more specific by marking that date on the bill and by clearly identifying it.

Analysis:

Customs agrees that, as proposed, it would not know when bills for reimbursable services and miscellaneous amounts are received by the debtor. Therefore, Customs has made extensive changes to the proposal. For those bills, if payment is not received by Customs on or before the "late payment date" specified on the bill, interest charges will be assessed upon the delinquent principal amount of the bill. The late payment date is the date 30 calendar days after the "interest computation date." The interest computation date is the date from which interest is calculated and is initially the "bill date" appearing on the bill.

Pursuant to § 210 of the Trade and Tariff Act of 1984, for bills for supplemental duties, (additional duties assessed upon liquidation or reliquidation) the principal amount of the bill shall be due 15 days from the date of liquidation or reliquidation and if not paid within 30 days after this date (the 45th day) shall be considered delinquent and bear interest from the due date (15th day after liquidation or reliquidation).

No interest will be assessed on bills for reimbursable services and miscellaneous amounts if Customs receives payment on or before the late payment date. To ensure processing within 30 days after the interest computation date (so that no interest will be assessed) it is essential that payment is received by Customs on or before the late payment date. No interest will be charged on bills for supplemental duties if Customs receives payment on or before the 45th day after liquidation or reliquidation.

This document amends § 24.3(e) to provide that except for a bill for supplemental duties, a bill for duties, taxes, or other charges is due and payable on the "bill date" appearing on the bill, rather than upon receipt thereof by the debtor.

This change is necessary because, as the commenters observe, Customs does not know exactly when a bill is received by a debtor. Moreover, it is Customs practice to mail a reimbursable service or miscellaneous bill before the "bill date." Therefore, in the usual situation, a party will receive a bill on or before the bill date. Customs notes that a debt for a reimbursable or miscellaneous service is incurred at the time of the action giving rise to such bill (e.g., when a reimbursable service was performed by a Customs officer).

Comment:

Currently, there is no mechanism for Customs to remove bills for supplemental duties off the collection process when a protest is filed. An importer and the surety continue to get "dunned" by Cus-

toms. Under the current proposal, the importer would be faced with interest on the increased duty billing. It is suggested that disputed items be placed under a different system. The rule should provide that the automated billing cycle and resulting interest charges are automatically suspended whenever such bills are questioned or disputed.

Analysis:

The billing system under development by Customs is designed to take into consideration entries under protest, as well as adjustments that are necessary due to improper billing addresses or other administrative errors. Under the terms of § 210 of Pub. L. 98-573 the bill is due and payable 15 days from the date of liquidation or reliquidation, whether or not a protest has been filed. Accordingly, a party will continue to receive a bill for supplemental duties from Customs even though a protest has been filed. Interest will be assessed if payment is not received by Customs within 30 calendar days after the due date for supplemental duty bills issued on or after November 29, 1984.

Comment:

Because of the billing method used by Customs, it is impossible to pay numerous bills within the time frame specified in the new proposal. A bill may be mailed to a different address of the same business entity without the envelope indicating that it contains a bill, or it may be directed to someone other than the person authorizing the service. Bills are not always properly identified as to the services being charged, the person's name authorizing the service, or when or where the service was performed. Bills may be in error. If bills (or substantiating documentation) are not timely received, will the interest charge still be due or be cancelled with proof of untimely receipt? The regulations should provide administrative relief from payment of interest charges if delays resulted, at least partially, due to errors by Customs personnel.

Analysis:

The Customs bill is used to collect amounts owed the Government. In the case of bills issued for amounts owed other than for supplemental duties, the party-in-interest is usually aware of the Customs billing schedule and the purpose for issuance of the bill. Bills for amounts owed as a result of the performance of a reimbursable service by a Customs official are issued approximately 2-3 weeks following actual performance. Requests for the service are made specifically by the party-in-interest receiving the service. The billing package of miscellaneous amounts received by the debtor contains the background information explaining the nature of the charge or provides a "Refer Inquiry To" name and address where the basis of the charge may be obtained. We believe that the time periods provided are sufficient for payment of Customs bills.

It is noted that the importer record number data provided by the importer/broker/party-in-interest is the basis for the Customs name and address file. If the legal provisions concerning the due date for entries under protest change, or verified administrative billing errors have occurred, the Customs billing system will be adjusted using an on-line data processing adjustment capability to update the accounts receivable and invoice files accordingly. Customs will make every effort to minimize any unnecessary administrative expense in a businesslike fashion similar to the usual private and banking interest assessment practices. The Customs bill designates a "Send Payment to" address and requests for administrative adjustments due to billing errors may also be sent to this address. Customs officials have the authority to make adjustments to interest amounts when there is a Customs billing error.

Comment:

Interest rates should be published in the CUSTOMS BULLETIN each quarter. Having to call a Customs regional office should not be necessary.

Analysis:

The Customs bill will show the current interest rate in effect. In addition, as stated in T.D. 85-93, the current semiannual interest rate may be obtained from the IRS or the Customs National Finance Center, Indianapolis, Indiana, at any time, and Customs will also publish the current interest rate in the CUSTOMS BULLETIN and Federal Register on a semiannual basis for the convenience of the importing public and Customs personnel.

Comment:

Simultaneous billing of principal and surety will decrease collection efficiency. Sureties will begin immediate collection action against all importers instead of the truly delinquent debtor. Importers will receive two bills practically simultaneously: one bill from Customs and one bill from the surety. By forcing the surety to expand its collection activities over a substantially larger base, there will be a corresponding loss of collection efficiency.

Analysis:

Customs has determined not to bill the principal and surety simultaneously at the time of the initial billing as proposed. However, upon the written request of a surety, Customs will provide a surety a notice containing billing information at the time of the initial billing to its principal. In addition to such notice, if any sureties will receive notice of the principal amount owed, any interest accruing, and other pertinent information on the monthly "Formal Demand on Surety for Payment of Delinquent Accounts Due" issued to sureties. This monthly notification to sureties will be issued for delinquent bills more than 30 days past due (60 days from bill due date).

Surety demand notices will be issued to sureties monthly until the account is paid or otherwise closed.

Comment:

It is suggested that no interest be assessed against a surety until Customs has provided a copy of the bond and entry in support of its claim. It is also suggested that the bill include the name and address of the principal, and name and address or code of the customs broker. The regulations should provide for placing the delinquent importer on the sanction list and withdrawing immediate delivery privileges.

Analysis:

As previously stated, Customs bonds make principals and sureties joint obligors. In addition, the Customs bond revision, T.D. 84-213, provides for the joint and several liability of the principal and surety for interest charges for specified bills if such bills are not paid timely. Customs will continue to provide copies of entries and bonds as it is determined to be necessary. However, whether or not Customs provides such documents does not affect the liability of a surety on the surety's bond for the amount owed by the principal.

The surety will be notified of the available name and address of the principal on the "Formal Demand on Surety for Payment of Delinquent Amounts Due" and when the bill is issued if the surety desires such notification. Efforts to improve the availability of data elements, including broker's name and address, or code, will be considered during future improvements to existing data processing systems.

Customs will continue to use the importer sanction list as judiciously as possible. However, charging interest is necessary to permit the Government to recover its costs to borrow funds.

Comment:

The effective rates of interest under the proposed regulations are unreasonable and to a great extent arbitrary because the interest would be charged for full 30-day periods. It is suggested either that interest be charged only for the time period of late payment, or that interest be calculated and charged in smaller time increments. (e.g., 10 days).

Analysis:

Customs disagrees. It has been determined that the charge will only be for those payments already in arrears. In fact, no interest will be charged for the period in which payment is actually made.

RELATED COURT DECISION

The U.S. Court of International Trade in *Heraeus-Amersil, Inc., v. United States*, 515 F. Supp. 770 (1981), held that any increased or additional duties determined to be due upon a liquidation or reliquidation are not due and payable at that time, but rather at the time of filing of a court action, or at the expiration of the statute of

limitations, if no action is filed. In *United States v. Heraeus-Amersil, Inc.*, Appeal No. 81-19 (February 18, 1982), the U.S. Court of Customs and Patent Appeals affirmed this decision. In light of this holding, Customs published a final rule document in the Federal Register (T.D. 83-14, 48 FR 1186, January 11, 1983) amending § 24.3(e), Customs Regulations (19 CFR 24.3(e)), to clarify the due date of Customs bills for supplemental duties. However, § 210 of the Trade and Tariff Act of 1984 (Pub. L. 98-573) overturned the decision in *Heraeus-Amersil*. Accordingly, § 24.3(e) is being amended to reflect these changes.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), it is certified that the rule will not have a significant economic impact on a substantial number of small entities. The large majority of delinquent bills outstanding tend to be from large importers, not small importers and other small entities. Indeed, neither small nor large entities are likely to be affected unless they are delinquent in their payments.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal authors of this document were Charles D. Ressin and Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR

Part 24

Customs duties and inspection, imports, accounting.

Part 113

Customs duties and inspection, imports, surety bonds.

AMENDMENTS TO THE REGULATIONS

Parts 24 and 113 Customs Regulations (19 CFR Parts 24, 113), are amended as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624, 31 U.S.C. 9701:

§ 24.1 also issued under 19 U.S.C. 197, 198, 1648;

§ 24.3 also issued under 19 U.S.C. 1505, 1520;
§ 24.4 also issued under 19 U.S.C. 1623, 26 U.S.C. 5007, 5054, 5061, 7805;

§ 24.11 also issued under 19 U.S.C. 1485(d);

§ 24.12 also issued under 19 U.S.C. 1524, 46 U.S.C. 927;

§ 24.14 also issued under 19 U.S.C. 1;

§ 24.16 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1623, 46 U.S.C. 2111, 2112;

§ 24.17 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562, 46 U.S.C. 2110, 2111, 2112;

§ 24.32 also issued under 19 U.S.C. 5582, 5583;

§ 24.36 also issued under 26 U.S.C. 6423.

2. Part 24 is amended by adding a new § 24.3a after § 24.3 to read as follows:

§ 24.3a Interest Charges on Certain Bills; Notice to Principal and Surety.

(a) *Due date of Customs bills.* Customs bills for supplemental duties (additional duties assessed upon liquidation or reliquidation), reimbursable services (such as provided for in §§ 24.16 and 24.17), and miscellaneous amounts (bills other than duties, taxes, reimbursable services, liquidated damages, fines, and penalties) shall be due as provided for in § 24.3(e).

(b) *Assessment of interest charges.*

(1) *Bills for reimbursable services and miscellaneous amounts.* If payment is not received by Customs on or before the late payment date appearing on the bill, interest charges will be assessed upon the delinquent principal amount of the bill. The last payment date is the date 30 calendar days after the interest computation date. The interest computation date is the date from which interest is calculated and is initially the bill date.

(2) *Bills for supplemental duties.* The due date for increased or additional duties, determined to be due upon a liquidation or reliquidation, is 15 days from the date of such liquidation or reliquidation. If such duties are not paid within 30 days after their due date (the 45th day), they shall be considered delinquent and bear interest from the due date.

(c) *Interest rate and applicability.*

(1) The percentage rate of interest to be charged on such bills will be based upon the semiannual rate(s) established under §§ 6621 and 6622 of the Internal Revenue Code of 1954 (26 U.S.C. 6621, 6622). The current rate of interest will appear on the Customs bill and may be obtained from the IRS or the Customs National Finance Center, Indianapolis, Indiana. Customs will also publish the current interest rate in the CUSTOMS BULLETIN and Federal Register on a semiannual basis.

(2) The percentage rate of interest applied to an overdue bill will be adjusted as necessary to reflect any change in the annual rate of interest.

(3) Interest on overdue bills will be assessed on the delinquent principal amount by 30-day periods. No interest charge will be assessed for the 30-day period in which the payment is actually received at the "Send Payment To" location designated on the bill.

(4) In the case of any late payment, the payment received will first be applied to the interest charge on the delinquent principal amount and then to payment of the delinquent principal amount.

(5) The date to be used in crediting the payment is the date on which the payment is received by Customs.

(d) *Notice.*

(1) *Principal.* The principal shall be notified at the time of the initial billing, and every 30 days after the due date until the bill is paid or otherwise closed. The following elements will normally appear on the bill:

- (i) Principal amount due;
- (ii) Interest computation date;
- (iii) Late payment date;
- (iv) Accrual of interest charges if payment is not received by the late payment date;
- (v) Applicable current interest rate;
- (vi) Amount of interest owed;
- (vii) Customs office where requests for administrative adjustments due to billing errors may be addressed; and
- (viii) Transaction identification (e.g. entry number, reimbursable assignment number.).

(2) *Surety.* (i) Customs will report outstanding bills on a Formal Demand on Surety for Payment of Delinquent Amounts Due, for bills more than 30 days past due (approximately 60 days after bill due date), and every month thereafter until the bill is paid or otherwise closed.

The following elements will normally appear on the report:

- (A) Principal amount due;
- (B) Interest computation date;
- (C) Late payment date;
- (D) Accrual of interest charges if payment is not received by the late payment date;
- (E) Applicable current interest rate;
- (F) Amount of interest owed;
- (G) Principal's name and address;
- (H) Customs office where requests for administrative adjustments due to billing errors may be addressed; and
- (I) Transaction identification (e.g. entry number, reimbursable assignment number).

(ii) Upon the written request of a surety, Customs will provide the surety a notice containing the billing information at the time of the initial billing to its principal.

3. Section 24.3(e), Customs Regulations (19 CFR 24.3(e)), is revised to read as follows:

§ 24.3 Bills and accounts; receipts.

* * * * *

(e) All other bills for duties, taxes, or other charges are due and payable upon the bill date appearing on the bill. A bill for increased or additional duties determined to be due upon a liquidation or reliquidation is due 15 days from the date of such liquidation or reliquidation.

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624:

Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

2. Section 113.63(f) is amended by removing the word "and" after paragraph (3), removing the period at the end of paragraph (4), adding "and" after paragraph (4), and by adding a new paragraph (5) to read as follows:

§ 113.63 Basic custodial bond conditions.

(f) *Reimbursement and Exoneration of the U.S.*

* * * * *

(5) Pay any charges found to be due Customs arising out of the principal's custodial operation.

3. Section 113.65(a) is amended by removing the word "and" after paragraph (2), removing the comma after the word "claim" and replacing it with a period in paragraph (2), removing the period at the end of paragraph (3), adding the word "and" after paragraph (3), and by adding a new paragraph (4) to read as follows:

§ 113.65 Repayment of erroneous drawback payment bond conditions.

(a) *Agreement Under Exporter's Summary Procedure.*

* * * * *

4. The principal agrees to pay any changes due Customs as provided by law or regulation.

WILLIAM VON RAAB,
Commissioner Customs

Approved: September 3, 1986.

MICHAEL H. LANE,

Assistant Secretary of the Treasury



U.S. Customs Service

General Notices

19 CFR Part 175

CLASSIFICATION OF ORANGE JUICE CONCENTRATE-BASED PRODUCT; SOLICITATION OF COMMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of comment period.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the classification of orange juice concentrate-based product. Customs received a petition submitted on behalf of a domestic interested party with respect to a Customs ruling that an orange juice concentrate-based product consisting of orange juice concentrated to 65° Brix to which certain ingredients were added was classified under item 183.05, Tariff Schedules of the United States (TSUS), as other edible preparations, not specially provided for. The petitioner contends that the subject product should be classified under item 165.29, TSUS, as concentrated orange juice or orange juice made from concentrated orange juice. The petitioner argues that orange juice is now provided for *eo nomine* in the TSUS because of an amendment by the Trade and Tariff Act of 1984 (Pub. L. 98-573).

A previous solicitation for comments was published in the Federal Register on July 30, 1986 (51 FR 27196). Comments were to have been received on or before September 29, 1986. Customs has received several requests to extend the comment period because additional time is required to prepare reasonably responsive comments. Customs believes the requests have merit. Accordingly, the period of time for the submission of comments is being extended 60 days.

DATE: Comments are requested on or before November 28, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and

§ 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the address above.

FOR FURTHER INFORMATION CONTACT: Thomas L. Lobred, Classification and Value Division (202-566-8181).

Dated: September 26, 1986.

JOHN P. SIMPSON,
*Director, Office of
Regulations and Rulings.*

[Published in the Federal Register, October 2, 1986 (51 FR 35240)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani

Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

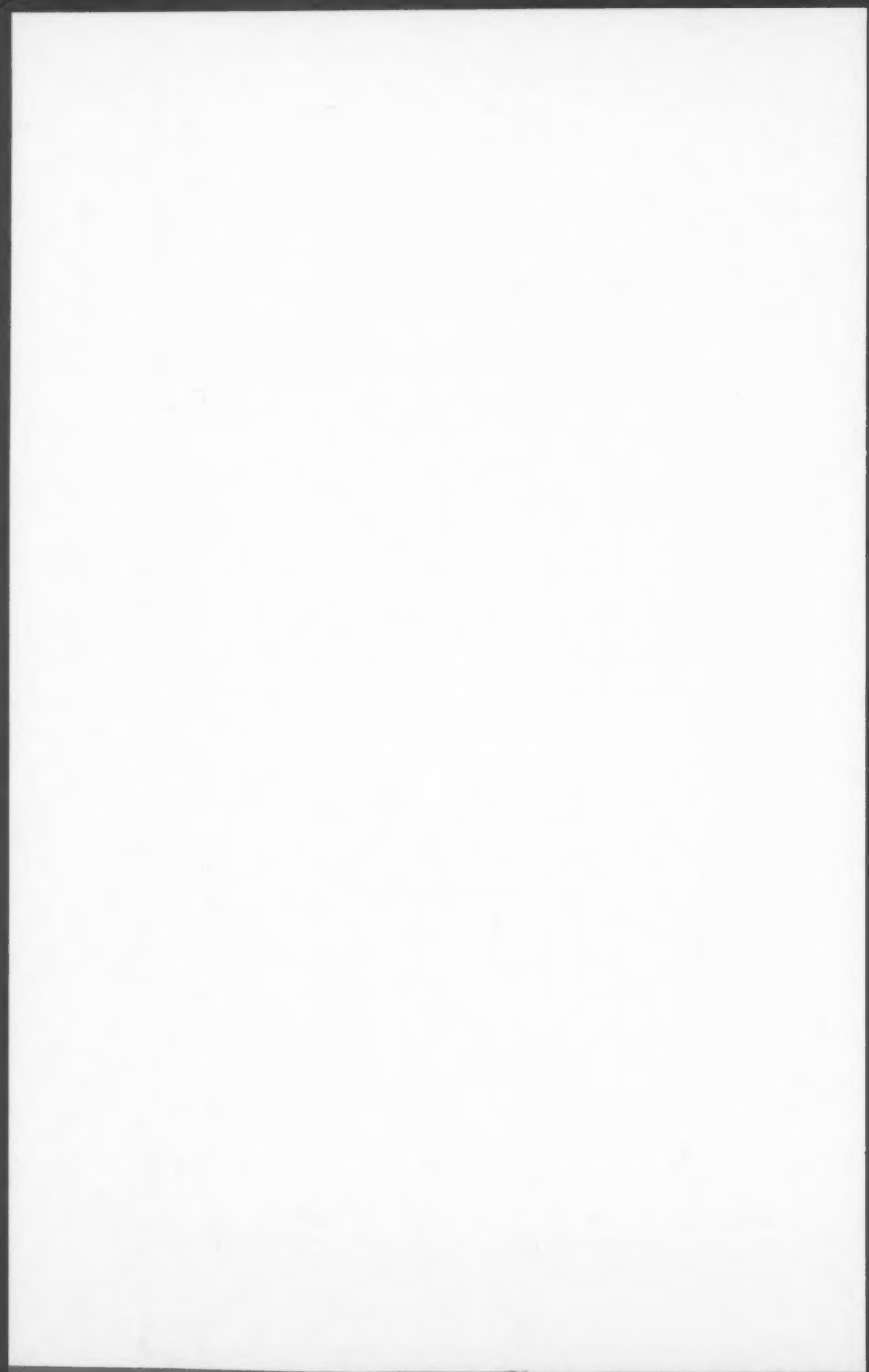
Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi



Decisions of the United States Court of International Trade

(Slip Op. 86-91)

THE CANADIAN MEAT COUNCIL AND ITS MEMBERS, INCLUDING CANADA PACKERS, INC., PLAINTIFFS, ALBERTA PORK PRODUCERS MARKETING BOARD, ET AL., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, NATIONAL PORK PRODUCERS COUNCIL, ET AL., DEFENDANT-INTERVENORS.

Court No. 85-09-01168

Before DiCARLO, Judge.

Following the issuance of a negative injury determination by the International Trade Commission (Commission), plaintiffs filed an action challenging a final affirmative subsidy determination by the Department of Commerce (Commerce) pursuant to 19 U.S.C. § 1516a(a)(3) (Supp. II 1984). Defendant and defendant-intervenors move to dismiss the action for lack of jurisdiction on the grounds that (1) actions may be brought under section 1516a(a)(3) only when the negative determination by the Commission is based on the size of the net subsidy or dumping margin found by Commerce, and (2) the action calls for an advisory opinion in violation of Article III of the Constitution since there is currently no countervailing duty order covering the relevant merchandise.

Held: Section 1516a(a)(3) permits a party to challenge a final affirmative subsidy determination when a final negative injury determination is the subject of a pending appeal. The action does not call for an advisory opinion since Commerce's final affirmative subsidy determination has legal consequences affecting the rights of the parties.

[The motion to dismiss is denied.]

(Decided September 12, 1986)

Arnold & Porter (Robert Herzstein, Lawrence A. Schneider and Alen O. Sykes) for plaintiffs.

Cameron, Hornbostel & Buttermann (William K. Ince and Caren Z. Turner) for plaintiff-intervenors.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Department of Justice, Commercial Litigation Branch (*Elizabeth C. Seastrum*); *Douglas Riggs*, General Counsel, United States Department of Commerce (*Lisa Koteen*), for defendant.

Thompson, Hine and Flory (Mark Roy Sandstrom) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DiCARLO, Judge: Plaintiffs bring an action contesting a final affirmative subsidy determination by the Department of Commerce,

International Trade Administration (Commerce) pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(3) (Supp. II 1984). Defendant and defendant-intervenors move to dismiss the action for lack of jurisdiction. The motion to dismiss is denied.

I. BACKGROUND

The members of the Canadian Meat Council are pork packers that do not produce live swine. The Canadian Meat Council and its members (plaintiffs) challenge Commerce's final affirmative subsidy determination in *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada*, 50 Fed. Reg. 25,097 (June 17, 1985). The action was commenced within thirty days after the International Trade Commission (Commission) published its final determination that an industry in the United States is materially injured by imports of live swine, but is not materially injured or threatened with material injury by imports of fresh, chilled or frozen pork from Canada. *Live Swine and Pork from Canada*, 50 Fed. Reg. 31,931 (Aug. 7, 1985). Accordingly, Commerce issued a countervailing duty order on imports of live swine, but not on imports of fresh, chilled or frozen pork. *Countervailing Duty Order; Live Swine from Canada*, 50 Fed. Reg. 32,880 (Aug. 15, 1985). The National Pork Producers Council and Wilson Foods Corp., defendant-intervenors in this case, have brought a separate action contesting the Commission's negative injury determination regarding fresh, chilled and frozen pork. *National Pork Producers Council v. United States*, Court No. 85-9-01209.

Defendant and defendant-intervenors (movants) seek dismissal of this action for lack of jurisdiction on the grounds that (1) the action may not be brought pursuant to section 1516a(a)(3) since Congress intended that such actions be brought only when the Commission's negative determination is predicated on the size of the net subsidy or dumping margin found by Commerce; and (2) the action calls for an advisory opinion in violation of Article III of the Constitution since there is currently no countervailing duty order regarding fresh, chilled and frozen pork from Canada.

The question presented is whether 19 U.S.C. § 1516a(a)(3) allows a party to challenge Commerce's final affirmative subsidy determination where the Commission's final negative injury determination has been contested, and if so, whether the action constitutes an actual case or controversy within the meaning of Article III of the Constitution.

II. DISCUSSION

1. *The Scope of Section 1516a(a)(3).*

A final affirmative determination by Commerce that a subsidy is being provided under 19 U.S.C. § 1671d (1982 & Supp. II 1984), may be challenged within thirty days after the publication of a final

countervailing duty order, under section 19 U.S.C. § 1516a(a)(2)(B)(i) (Supp. II 1984). An opportunity for challenging a final affirmative subsidy determination is also provided by section 1516a(a)(3), which states:

Exception—Notwithstanding the limitation imposed by paragraph (2)(A)(ii) of this subsection, a final affirmative determination by the administering authority under section 1671d or 1673d of this title may be contested by commencing an action, in accordance with the provisions of paragraph (2)(A), within thirty days after the date of publication in the Federal Register of a final negative determination by the Commission under section 1671d or 1673d of this title.

This action comes within the class of actions described in section 1516a(a)(3). Movants argue, however, that section 1516a(a)(3) must be read in the context of House Report on the Trade and Tariff Act of 1984 (Act), which says that section 1516a(a)(3) may be invoked only when the Commission's negative determination "is predicated on the size of the dumping margin or net subsidy." H. Rep. No. 98-725, 98th Cong., 2d Sess. 47, *reprinted in* 1984 U.S. Code Cong. & Ad. News 5127, 5174.

Movants' argument is misplaced. The passage quoted from the legislative history was written for proposed legislation which would have limited appeals under section 1516a(a)(3) to instances where negative Commission determinations were predicated on margin or net subsidy size. Defendant concedes that "[t]he 'exception' as finally enrolled in section 516a(a)(3), however, was shorn of the clause limiting its application to cases where the ITC used margins analysis." Reply Brief for Defendant, at 7. Since the language regarding margin or net subsidy size was deleted, the House Report does not reflect Congress' intent concerning the availability of section 1516a(a)(3) review.

Only in the Summary of Provisions of H.R. 3398, Trade and Tariff Act of 1984, House Ways and Means Committee Print No. 98-39, at 33, is the final version of section 1516a(a)(3) described. The report, which does not constitute part of the legislative history of the Act, states in part:

The conference agreement eliminates all interlocutory judicial reviews by the U.S. Court of International Trade during the course of CVD and AD investigations. All challenges to agency determinations would be combined and reviewable by the court after final agency action has been taken. The agreement also clarifies when negative portions of affirmative determinations may be reviewed, *and that a final affirmative determination by the administering authority may be contested when an appeal is based on a negative determination by the ITC* [emphasis added].

The Court finds nothing in the legislative history of the Act showing that section 516a(a)(3) as enacted was intended to apply only

where negative Commission determinations are based on the size of the net subsidy or dumping margin.

The Court disagrees with movants' further argument that Congress intended to eliminate section 1516a(a)(3), and that its survival in amended form was inadvertent. To declare that section a nullity would violate the express language of the statute.

The Court holds that section 1516a(a)(3) permits a party to challenge Commerce's final affirmative subsidy determination where the Commission's final negative injury determination has been contested.

2. Constitutionality of Section 1516a(a)(3).

Movants argue that if section 1516a(a)(3) permits this action to be brought, the statute unconstitutionally requires this Court to render an advisory opinion. They say that if the Commission's negative injury determination is upheld in *National Pork Producers Council v. United States*, Court No. 85-9-01209, an opinion regarding the validity of Commerce's affirmative subsidy finding would prove advisory. Movants' argument rests upon the assumption that unless the negative determination of the Commission is the result of margins analysis, an affirmative subsidy determination presents a live controversy only when it is certain that countervailing duties will be imposed.

"Congress may not, of course, require this Court to render opinions in matters which are not 'cases or controversies.'" *Buckley v. Valeo*, 424 U.S. 1, 11 (1976). Article III of the Constitution limits the jurisdiction of this Court to disputes which call "for an adjudication of present right upon established facts." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 242 (1937). "This requires a real and substantial dispute affecting the legal rights and obligations of parties with adverse interests." *C.R. Bard, Inc. v. Schwartz*, 716 F.2d 874, 879 (Fed. Cir. 1983). A final administrative action that "determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable." *Pennsylvania Railroad v. United States*, 363 U.S. 202, 205 (1960).

The subsidy investigation regarding live swine and fresh, chilled and frozen pork from Canada is final and complete. Commerce's role in the administration of the subsidy investigation terminated when it issued its final determination which established that the investigated industry is receiving countervailable subsidies, and that countervailing duties would be assessed on all relevant products upon the issuance by the Commission of an affirmative injury determination.

Although Commerce's final determinations constitute final agency action, Congress has prohibited parties from seeking review of those determinations prior to the issuance of the Commission's determination. By postponing challenges to final affirmative Commerce determinations, section 1516a effectively eliminates those ap-

peals which are rendered unnecessary by the Commission's determination. Thus, where the Commission determines that there is no injury, and no appeal from that determination is brought, the proceedings are at an end and Commerce's determination can have no further impact on the parties' rights.

Section 1516a(a)(3) gives a right to review a final affirmative subsidy determination where the legality of a negative injury determination has been placed in question. The appeal in *National Pork Producers Council v. United States*, Court No. 85-9-01209, may result in a determination that an industry in the United States is materially injured or threatened with material injury by imports of fresh, chilled and frozen Canadian pork products.

If an affirmative determination by the Commission is issued, Commerce's final affirmative subsidy determination retains its full vitality and effect, and provides a basis for the issuance of a countervailing duty order. The Court holds that Commerce's final affirmative subsidy determination is an action from which legal consequences flow, having a substantial impact on the rights of the parties. See *Pennsylvania Railroad v. United States*, *supra*. It is within the Court's power under Article III of the Constitution to entertain a challenge to the validity of the determination as required by section 1516a(a)(3).

The Court disagrees with movants' contention that this case is governed by *American Spring Wire Corp. v. United States*, 6 CIT 122, 569 F. Supp. 73 (1983), where an action challenging a suspension agreement based on an affirmative subsidy determination was held to be moot once a negative injury determination was issued. In that case the suspension agreement, the subject of the challenge, became void and could not be resurrected once the Commission issued its final negative injury determination:

It is true that in another action pending in this court, * * * plaintiffs have challenged the ITC's no-injury determination—the event which terminated the suspension agreement. However, *no disposition of that determination by this court could possibly breathe new life into the suspension agreement.* The ITC's no-injury finding sounded the death knell of that agreement; this court lacks power to resurrect it, under the circumstances presented here.

6 CIT at 124, 569 F. Supp. at 75 (emphasis added). In contrast, the case before the Court presents a live controversy since the reversal of the Commission's negative injury determination would result in the issuance of a countervailing duty order.

III. CONCLUSION

Section 1516a(a)(3) permits a party to challenge a final affirmative subsidy determination where a final negative injury determination is the subject of a pending appeal. The action does not call for an advisory opinion since Commerce's final affirmative subsidy de-

termination has legal consequences affecting the rights of the parties.

The motion to dismiss is denied.

(Slip Op. 86-92)

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSCALI, AND ENZO PIZZI,
INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-10-01435

Before DiCARLO, Judge.

[The action is dismissed.]

(Decided September 15, 1986)

Klayman & Gurley, P.C. (Larry Klayman and John Gurley) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Elizabeth Seastrum*; *Edward Madaj*, International Trade Commission, of counsel) for defendant.

Mudge, Rose, Guthrie, Alexander & Ferdon (N. David Palmeter and Jeffrey Neeley) for amicus curiae Hyundai Steel Ind. Co. Ltd.

Dewey, Ballentine, Bushby, Palmer & Wood, (Alan Wm. Wolff, Jane Albrecht) and *Akin, Gump, Strauss, Hauer & Feld, (Richard R. Rivers)* for amicus curiae Lone Star Steel Co.

MEMORANDUM OPINION AND ORDER

DiCARLO, Judge: On June 12, 1986 the Court held that a final determination by the Department of Commerce, International Trade Administration (Commerce) that pads for woodwind instrument keys from Italy are being sold in the United States at less than fair value, was not supported by substantial evidence or in accordance with law. *Luciano Pisoni Fabbrica Accessori Instrumenti Muscali, et al. v. United States*, 10 CIT —, Slip Op. 86-62 (June 12, 1986). Commerce's final determination had resulted in an order assessing an antidumping duty of 1.16% *ad valorem*.

The Court held that Commerce had improperly compared different merchandise in determining the difference between United States price and home market price. The action was remanded to Commerce with instructions to make an adjustment for differences in the physical characteristics of the merchandise under 19 C.F.R. § 353.16 (1985).

The Court also held that in an investigation involving only ten home market sales, Commerce may not reasonably find a dumping margin by using quarterly exchange rates when no dumping margin would result if conversions were based on rates prevailing at the time of the transactions.

In accordance with the Court's instructions, Commerce made a merchandise adjustment under 19 C.F.R. § 353.16 and used daily exchange rates for all lira/dollar conversions. Commerce found a

weighted-average dumping margin of .286%, which it said was *de minimis*, and concluded that the merchandise was being sold in the United States at not less than fair value.

Although Commerce did not give its reasons for finding the dumping margin *de minimis*, see *Carlisle Tire & Rubber Co. v. United States*, 10 CIT —, 634 F. Supp. 419 (1986), the parties have submitted their comments on the remand proceedings, and there are no objections to Commerce's redetermination.

Accordingly, Commerce's redetermination is affirmed and the action is dismissed. So ordered.

(Slip Op. 86-93)

THE DESERET CO., PLAINTIFF V. UNITED STATES, DEFENDANT

Court No. 83-5-00718

(Decided September 17, 1986)

Barnes, Richardson & Colburn (David O. Elliott) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office and *Barbara M. Epstein*, Civil Division, United States Department of Justice.

OPINION

RESTANI, *Judge*: This action involves the proper classification for tariff purposes of electro-cardiograph (EKG) electrodes, pads, and strippers. Each EKG electrode consists of a circular piece of foam with an adhesive on one side. In the center of the foam is a metal electrode on a small pre-gelled disc. The electrode is in the form of a snap which enables it to be connected to lead wires. These wires are attached to a cable which is plugged into an EKG machine. Each EKG pad consists of a piece of rectangular foam on which there are affixed four metal or silver chloride electrodes, surrounded by four adhesive discs. A separate wire is attached to each of the four electrodes. These wires are bound together at one end by a connector that allows the wires to be plugged into the cable which, in turn, is plugged into the EKG machine. Each EKG stripper consists of either three or four electrodes, each of which is connected to a separate wire. The wires are bound together at one end by a four pole plug. The plug is attached to the cable which is plugged into the EKG machine.

Upon entry through the port of Nogales, Arizona, in 1981, the United States Customs Service (Customs) classified the EKG pads and EKG strippers under item 688.15 of the 1981 Tariff Schedules of the United States (TSUS) which provides for: "[i]nsulated * * * electrical conductors * * * [w]ith fittings * * * Other," at the rate of 6.3% *ad valorem*. The EKG electrodes were classified under item 685.90, TSUS (1981), as "other electrical apparatus * * * for making

connections to or in electrical circuits" at the rate of 7.7% *ad valorem*. Plaintiff, Deseret Company (Deseret), challenges Customs' classification and alleges, instead, that the proper classification for all the merchandise is item 709.17, TSUS, which provides for "electro-medical apparatus and parts thereof * * * Other," at the rate of 5.6% *ad valorem*.

In support of its classification, Customs asserts that the articles in question are not separate "apparatus," but are "parts" of an EKG machine and that TSUS General Interpretative Rule 10(ij) is controlling. General Interpretative Rule 10 (ij) provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." Customs further states that items 685.90, TSUS and 688.15, TSUS, specifically provide for the articles.

In contrast, plaintiff argues that the articles are "apparatus," rather than "parts" and that General Interpretative Rule 10(ij) is therefore inapplicable. In addition, plaintiff states that because the articles are "apparatus," headnote l(vi) of part 5 to schedule 6, which applies to Customs' classification here, precludes classification of the articles in question under items 685.90 and 688.15, TSUS. This headnote states that part 5 to schedule 6 "does not cover * * * electrical instruments and apparatus provided for in schedule 7." Plaintiff, therefore, claims that item 709.17, TSUS, is the proper classification for the merchandise. The court notes that plaintiff concedes that if the articles in question are "parts," then Customs' classifications here are correct.² Defendant, on the other hand, concedes that if the articles are "apparatus," then plaintiff's asserted classification must prevail.

This case cannot be decided on such a basis. The terms "parts"³ and "apparatus" are not mutually exclusive and an article may be apparatus and at the same time may be a part of another article. See *J.E. Bernard & Co., Inc. v. United States*, 62 Cust. Ct. 536, 259 F. Supp. 1129 (1969) *aff'd* 58 CCPA 91, 436 F.2d 506 (1971) (meter iris-

¹ The statistical annotations to item 709.17 are subdivided into (1) "Therapeutic apparatus," which is not applicable, (2) "Other apparatus," which includes "electrocardiographs;" and (3) "Parts, not specifically provided for."

² Plaintiff apparently acknowledges, therefore, that if the articles are "parts," they are specifically provided for in schedule 6, part 5. What constitutes a specific provision for purposes of Rule 10(ij) is a topic of some debate, but applicable general provisions will suffice. See *Tariff Classification Study, Seventh Supplemental Report* (Aug. 14, 1963) (p. 99):

General Headnote 10(ij)—Parts. A provision for "parts" does not prevail over a specific provision for such part. Thus, a provision for "parts" is more specific than a provision for "articles, not specially provided for," but is not more specific than provisions such as the following for: "springs" (item 682.85), "illuminating articles" (items 683.30-40), "pumps" (items 680.90-95.15), etc.

The court does not rely on plaintiff's concession and does not reach the issue of whether Customs' classifications are sufficiently "specific" within the meaning of Rule 10(ij).

³ There seems to be confusion as to whether Rule 10(ij) provides a definition of "parts." It does not. The main clause of Rule 10(ij) specifies in what circumstances merchandise may be classified under a provision for parts of another article rather than as a separate item. Merchandise may be so classified when it is "chiefly used as a part of such article." This rule of classification is meant to override prior case law which required the merchandise to be dedicated to use as a part of such article. See *E.R. Hawthorne & Co., Inc. v. United States*, 730 F.2d 1490, 1492 (Fed. Cir. 1984) (citing 2 R. Sturm, *Customs Law and Administration*, § 354.9, at 42 (3rd Ed. 1983)). See also *United States v. DeLaval Separator Co.*, 66 CCPA 48, 50, 669 F.2d 1134, 1135-36 (1979) (farm tanks classified as "parts" because they were "solely or chiefly" used as parts of another article). This rule of classification does not, however, answer the question of what is a part of an article. That question remains to be analyzed pursuant to the standards developed in a long line of cases. "The nature, function and purpose of an item in relation to the article to which it is attached or designed to serve determines whether the item constitutes a part of the article." *Ideal Toy Corp. v. United States*, 58 CCPA 9, 13, 433 F.2d 801, 803 (1970).

There is no question that the merchandise at issue here is "chiefly used" with an EKG machine. In fact, the parties have stipulated that this is the only use of the merchandise. There is a question as to whether the merchandise is a part of the EKG machine. This is, many things, which are used only with an article, and without which the article would not function, are not parts. Film for a camera is one common example.

es in motion picture cameras were both parts and apparatus); *Westinghouse Electric International Co. v. United States*, 28 Cust. Ct. 209, 218, C.D. 1411 (1952) (cameras used with X-ray apparatus held to be parts and apparatus).⁴

The merchandise at issue fits the broad definition of apparatus—an aggregate of materials intended for a specific use. *ITT Thompson Industries, Inc. v. United States*, 3 CIT 36, 44, 537 F. Supp. 1272, 1277-78, *aff'd* 703 F.2d 585 (Fed. Cir. 1982). Furthermore, the merchandise fits the definition of electro-medical apparatus. Defendant, however, cites *ITT* in support of its position. In *ITT* the court found that the lamp sockets and harnesses at issue were not classifiable as "electric lighting equipment" or "visual signaling apparatus" because they were only "parts" of these items. 3 CIT at 39-46, 49, 537 F. Supp. at 1274-79, 1281. The court was convinced by the relevant legislative history and trial testimony that "electric lighting equipment" must be able, "standing alone, [to] produce light or otherwise illuminate." *Id.* at 40, 537 F. Supp. at 1274. Similarly, the court found that "visual signaling apparatus" is "meant to encompass imported items that actually (physically) convey a visual or a sound signal * * *." *Id.* at 43, 537 F. Supp. at 1277. Although sockets fall within the definition of "apparatus," *id.* at 44-46, 537 F. Supp. at 1277-78, they do not, by themselves, carry out the specified functions and therefore can not be classified as either "electric lighting equipment" or "visual signaling apparatus." *Id.* Neither may harnesses be so classified because they too are incapable, by themselves, of producing light or sound. *Id.* at 49, 537 F. Supp. at 1281.

It does not follow from *ITT*, however, as defendant argues, that to constitute "electro-medical apparatus," the articles in question here must be capable "of providing an electro-medical end result, such as monitoring the heart." Post Trial Brief For The United States at 14. Defendant cites nothing in the relevant legislative history, in any definition of "electro-medical apparatus" or in any evidence before the court to suggest such a requirement. In fact, the *Tariff Classification Study* for schedule 7, part 2 subpart B, in which item 709.17 appears, does not indicate that the articles covered must function alone as medical apparatus but rather states that they must be "used generally" in a medical context. 9 *Tariff Classification Study* 144 (1960)⁵; but cf. *ITT*, 3 CIT at 41, 537 F. Supp. at 1275 (legislative history to TSUS item for "electrical lighting equipment" states that the item covers "'illuminating articles'" and thus requires that article must have an "end functional result of actual illumination * * *") (supplying emphasis). In this case, the merchandise in question is designed to attach to the human body for one electro-medical

⁴ Although *Westinghouse* was decided prior to the introduction of General Interpretative Rule 10(ij) and headnote I(vi), it remains valid for the proposition that "parts" and "apparatus" are not mutually exclusive terms.

⁵ Provisions dealing with medical instruments and appliances within schedules 2, 3, 4, 9, 12, 13 and 15 of the Tariff Act of 1930 were incorporated into schedule 7, part 2, subpart B. See 9 *Tariff Classification Study* at 102-03. Subpart B, medical and surgical instruments and apparatus, of schedule 7, part 2, "covers a wide variety of instruments and appliances used generally in professional practice for diagnosis, prevention, and treatment of diseases, the correction of deformities and defects, the repair of injuries, etc." 9 *Tariff Classification Study* 144 (1960) (emphasis added).

function, and it is used only with electrocardiograph machines. Thus, this merchandise is undoubtedly "used" for medical purposes and the court will not impose defendant's narrow construction on TSUS item 709.17.

Inasmuch as the merchandise at issue is "electro-medical apparatus," it is irrelevant whether or not it is also parts of another electro-medical apparatus. If it were parts of a larger apparatus, Rule 10(ij) would not allow the merchandise to be classified under the "parts" provision of item 709.17, because a non-parts section of that same item specifically covers the merchandise.⁶ Thus, the question here is not whether the merchandise is parts or apparatus but whether it is better classified under item 688.15 and 685.90 or under item 709.17; that is, not as "parts" but as "electro-medical apparatus" itself. Headnote 1(vi) provides the answer to this question. It is indicated that merchandise should not be classified under part 5 of schedule 6 if it is provided for in schedule 7. As indicated, the merchandise is provided for in schedule 7 at item 709.17, TSUS. A more detailed analysis of the legislative history supporting this result is found in *Terumo Corp. v. United States*, 10 CIT—, Slip Op. 86-19 (Feb. 21, 1986). Inasmuch as such history has been so recently and thoroughly discussed, it will not be repeated here.

Accordingly, the court holds that plaintiff has overcome the presumption of correctness applying to Customs' classification and has established that item 709.17, TSUS, is the proper classification for the EKG electrodes, pads, and strippers.

⁶ Item 709.17, TSUS is sufficiently "specific" for purposes of Rule 10(ij). See *supra* note 2.

ABSTRACTED CLASSIFICATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Item
C86/165	Re, C.J. September 11, 1986	Sanwa Foods Inc.	82-12-01639, etc.	Item 774.55 7.3% or 7.7%	Item 77 5.8%
C86/166	Restani, J. September 11, 1986	North American Foreign Trading Corp.	83-8-01239, etc.	Item 715.05, 715.15, 716.18, 720.28, 720.35, or 774.55 various rates	Item 65 5.1%

ATION DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate		
Item 772.20 5.8% or 6.4%	Agreed statement of facts	Los Angeles Unassembled or unfinished plastic containers chiefly used for marketing merchandise
Item 688.36 5.1% or 4.9%	Agreed statement of facts	New York Electronic watches

ABSTRACTED VALUATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/243	DiCarlo, J. September 9, 1986	Carlyle Footwear	80-1-00056, etc.	American selling price	Appr pai
V86/244	Re, C.J. September 11, 1986	Marubeni Iida America, Inc.	75-5-01130	Export value or Constructed value for items marked "A" United States value for items marked "C"	Unit ap les ma wi cu ite Equa an cu les un du val ma
V86/245	Re, C.J. September 11, 1986	Marubeni America, Inc.	75-1-00174	Export value or constructed value for items marked "A"	Unit ap les ma wi val flu ma

ADJUDICATION DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
Appraised values less 22%, per pair	Agreed statement of facts	New York Footwear
Unit values found by the appraising customs official, less ocean freight and marine insurance, and without additions for currency fluctuation, for items marked "A"	C.B.S. Imports Corp. v. U.S., C.D. 4739	Los Angeles Various articles
Equal to appraised values less any additions made for currency fluctuation, and less 10%, or the invoiced unit values, less all non-dutiable charges, whichever value is higher for items marked "C"		
Unit values found by appraising customs official, less ocean freight and marine insurance, and without additions to said values for currency fluctuation, for items marked "A"	C.B.S. Imports Corp. v. U.S. C.D. 4739	Los Angeles Various articles

					Equal to any current less 1 unit duties value mark
V86/246	Re, C.J. September 12, 1986	Puma USA, Inc.	83-10-01547	Transaction value	Invoice Ltd.
V86/247	Restani, J. September 12, 1986	Samuel Brilliant Co.	84-1-00065	Export value	Invoice net,

Equal to appraised values, less any additions made for currency fluctuation, and less 10%, or the invoiced unit values, less all non-dutiable charges, whichever value is higher for items marked "C"		
Invoiced price paid to Ormaco Ltd. of Hong Kong	Agreed statement of facts	San Juan Footwear
Invoice value of \$2.80 per pair, net, packed	Samuel Brilliant v. U.S. S.O. 85-42	Boston Footwear

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Third Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, October 24, 1986, at The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The Conference will be composed of the Judges of the United States Court of International Trade; officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests. The theme of the Conference is "Judicial Oversight—Relations Between the Court and the Agencies."

Sir Roy Denman, Head of the Delegation, Delegation of the Commission of the European Communities, is the Conference Luncheon Speaker.

Senator Dennis DeConcini, United States Senator from Arizona, and co-sponsor of the Customs Courts Act of 1980, will receive the Court's Annual Award for his outstanding contributions to the administration of justice in international law.

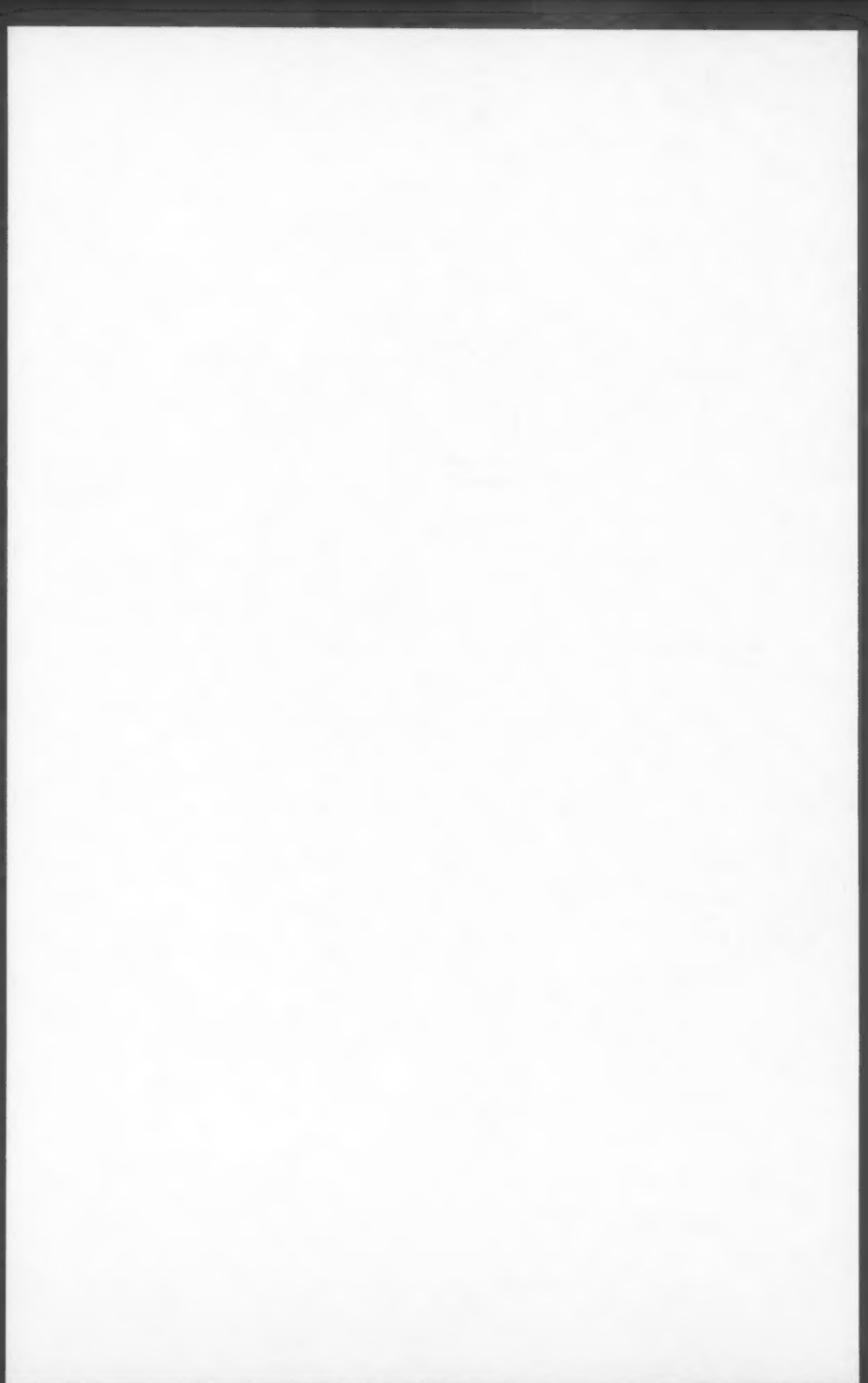
Last year, the Second Annual Judicial Conference was attended by over 400 conferees from 16 states, the District of Columbia, Puerto Rico, and Japan.

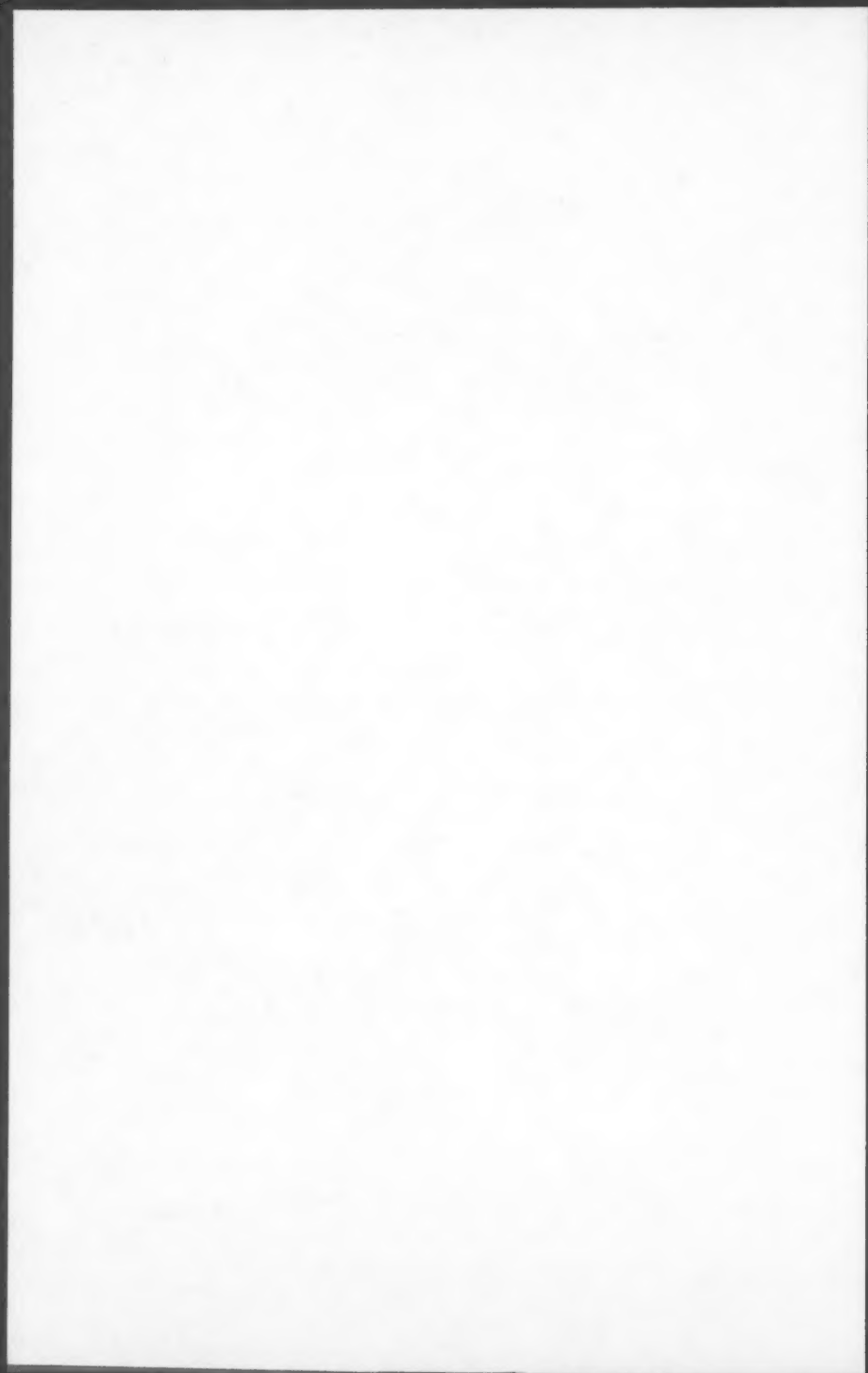
Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Wednesday, October 1, 1986.

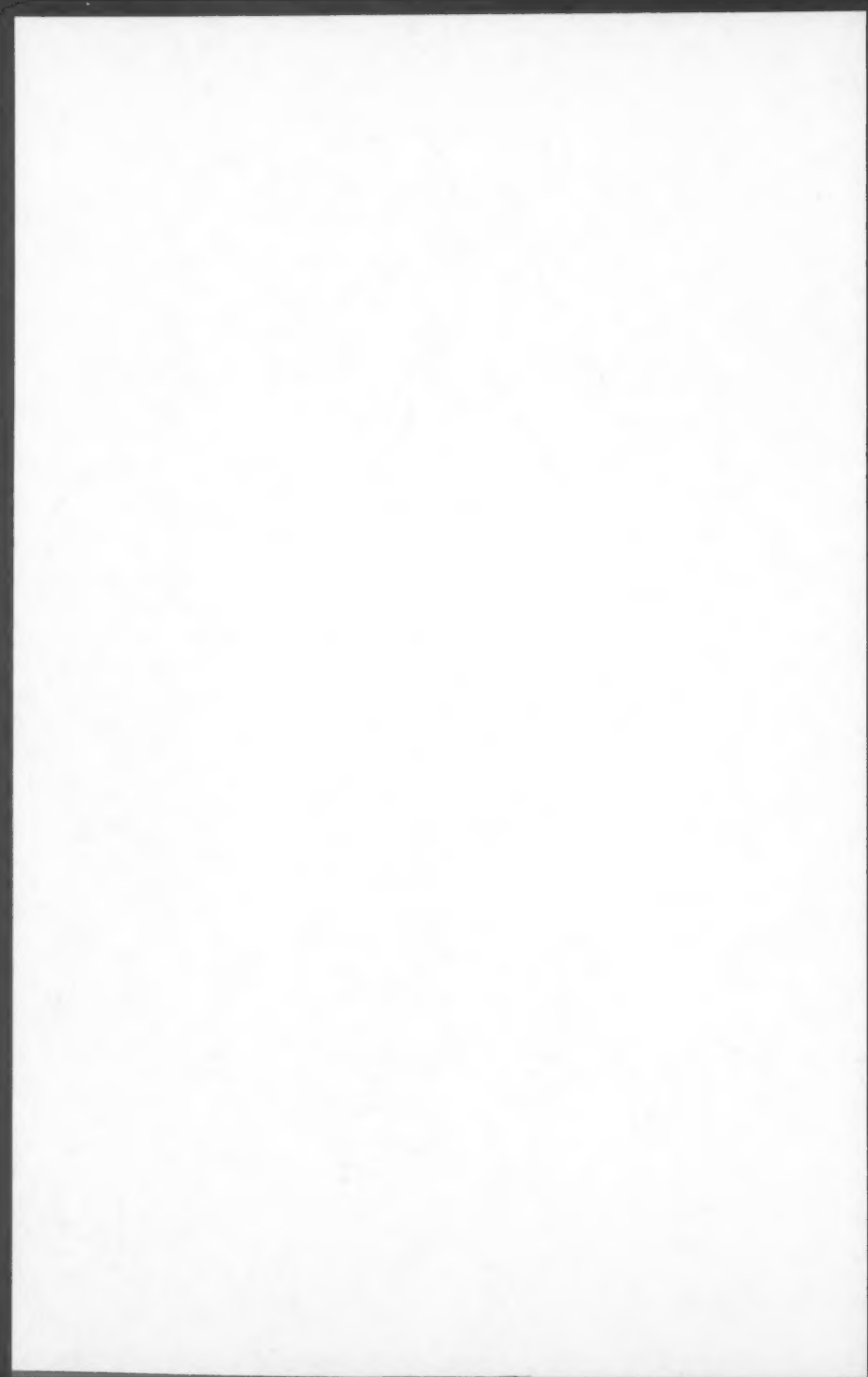
For further information, please write to:

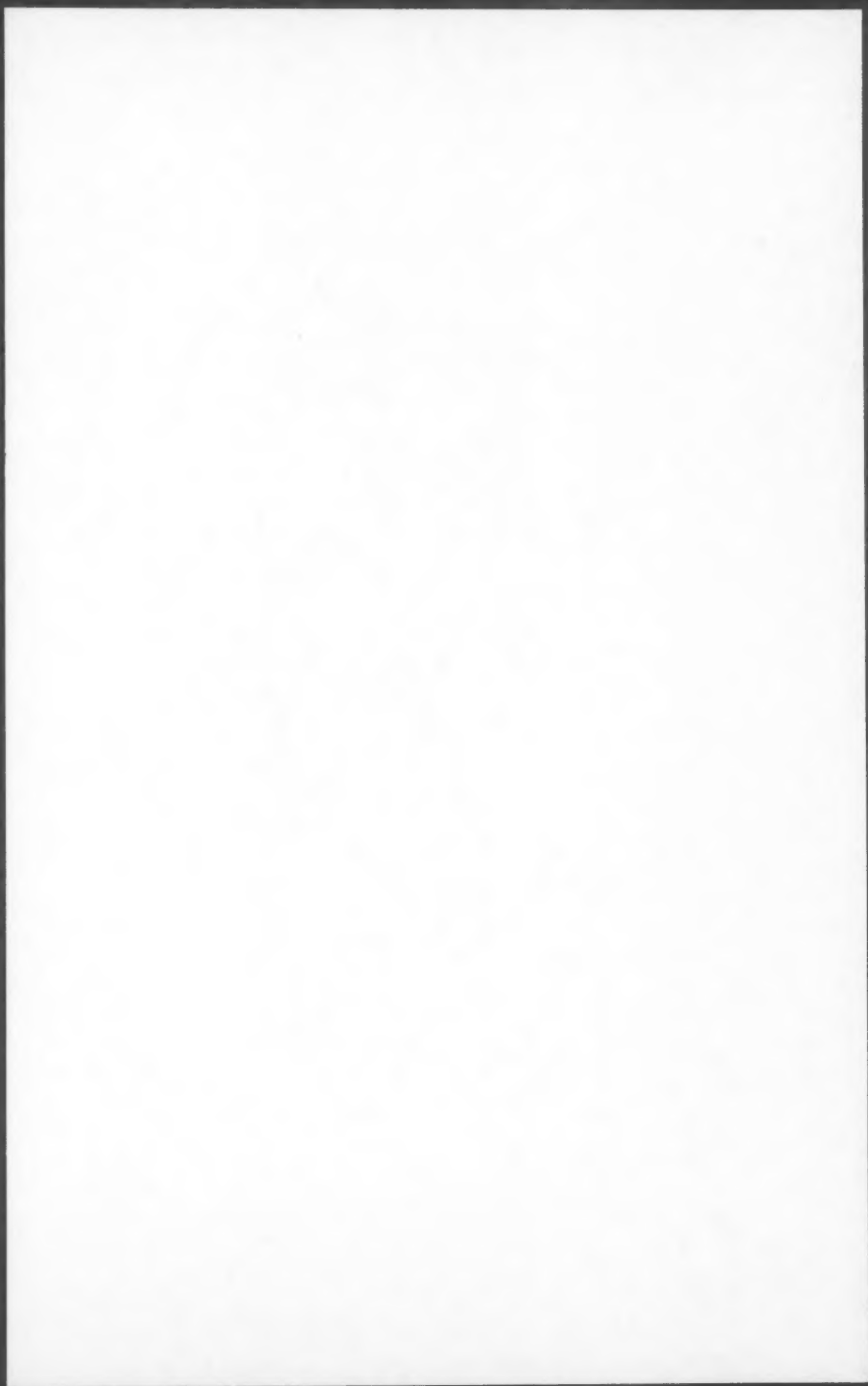
USCIT Judicial Conference
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United States Court of International Trade
One Federal Plaza
New York, New York 10007

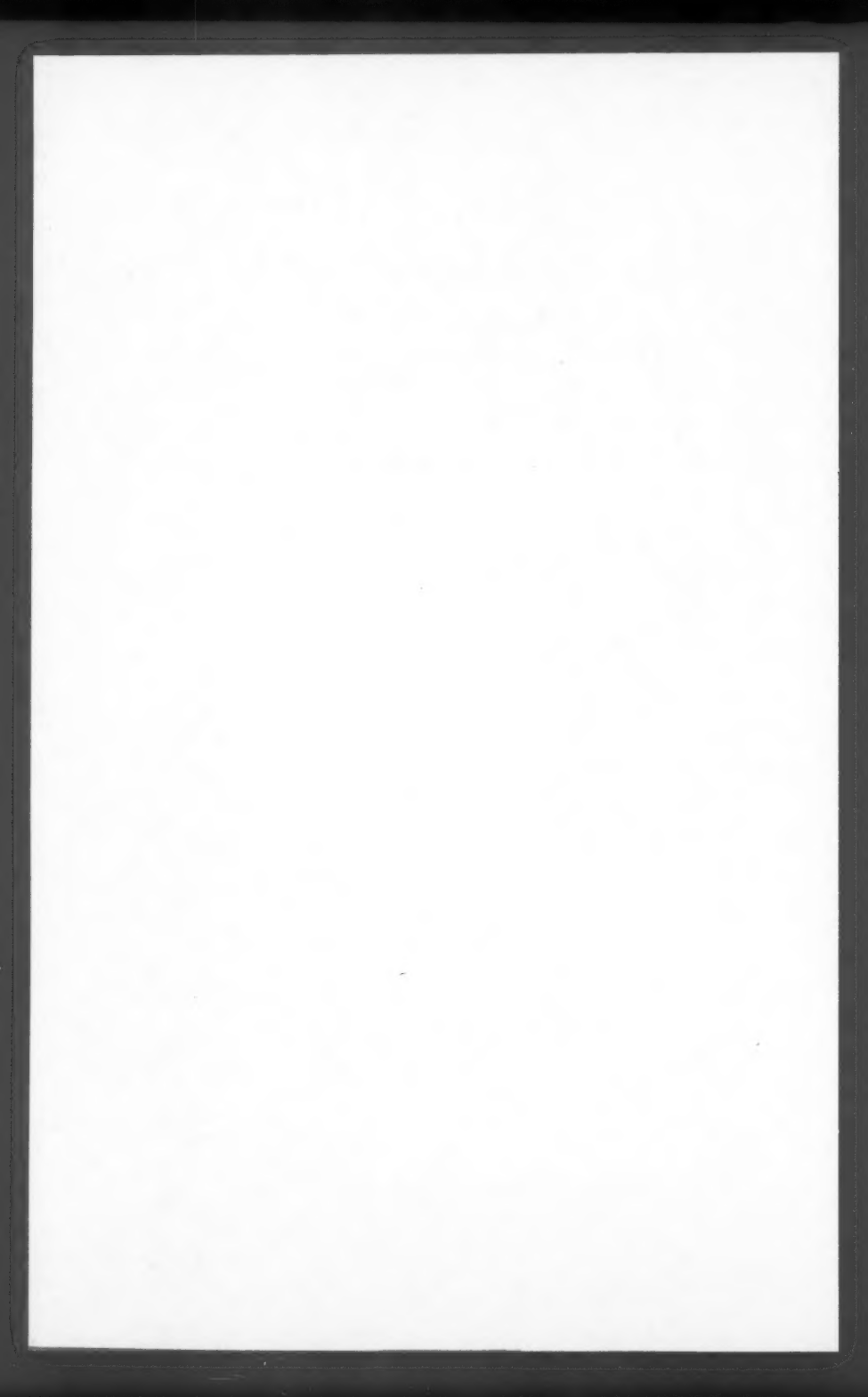
JOSEPH E. LOMBARDI,
Clerk of Court.











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